

A **WINDI LESTARI v. PP & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA  
LINTON ALBERT JCA  
MOHTARUDIN BAKI JCA  
VARGHESE GEORGE JCA

B [CRIMINAL APPEALS NO: W-05-199-07-2012 (IDN),  
W-05-200-07-2012 (IDN) & W-05-201-07-2012 (THA)]  
8 JUNE 2015

C **CRIMINAL LAW:** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Prima facie case – Whether established – Bags containing drugs found in first and second appellants’ hotel room – Whether first and second appellants had knowledge of drugs – Whether first and second appellants innocent carriers – Failure to raise issue of existence of another person at earliest available opportunity – Cautioned statements silent on matter – Whether there were reasons to interfere with trial judge’s finding of guilt – Whether conviction and sentence against first and second appellants affirmed*

D **CRIMINAL LAW:** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Prima facie case – Whether established – Bags containing drugs found in first and second appellants’ hotel room – Whether nexus between first and second appellants with third appellants proven – No incriminating evidence found in third appellant’s room – Bag containing drugs allegedly taken out of third appellant’s hotel room – Whether bag could have been tampered with – Whether nexus between third appellant and bags containing drugs proven – DNA profile of third appellant found on black pants in bag containing drugs – Whether amounted to conclusive evidence that third appellant had knowledge and possession of drugs – Whether defence cast reasonable doubt on prosecution’s case – Whether conviction safe*

The appellants, A1, A2 and A3, had been jointly charged for the offence of trafficking 3421.5g of methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (‘DDA’). The evidence led by the prosecution showed that

G A1 and A2 had together on the night of 5 July 2009 checked into Winsin Hotel and occupied Room 409. A3, on the other hand, had checked into the same hotel on the morning of 7 July 2009 and had been allotted the use of Room 305. Acting on information that a transaction involving drugs was to take place at Winsin Hotel, SP6 and his raiding party had observed Room

H 305. At about 11am, a woman was seen entering Room 305 and leaving the said room with a blue-coloured haversack-bag. According to the police witnesses, A1 and A2 subsequently met up with A3 on the road outside the hotel. All three were then arrested and brought back to the hotel. A search was made on Room 305 where nothing incriminating was found. In Room

I 409, an unlocked big black suit case (‘P9’) was found and upon inspection of the said P9, a brown plastic packet containing some substance in crystalline form and powder form was discovered in a concealed compartment. Another blue black coloured bag (‘P10’) found in Room 409

was also examined where two dark coloured plastic wrapped packages were found concealed also containing similar substance. These packages were then sent for analysis and the report from the chemistry department showed that the substance seized was methamphetamine. The prosecution's case essentially was that the drugs were recovered from the bags found in Room 409 occupied by A1 and A2. The prosecution further contended that P10 was the bag (haversack) that had been brought in by A3 as seen in a CCTV recording, which was then taken out by A2 from Room 305 when A2 was seen exiting from that room. Also, according to the prosecution, the black long pants with the DNA profile of A3 was found in P10. The trial judge was satisfied that the prosecution had established a *prima facie* case against the three accused persons and called for their defence. A1 and A2 submitted that they were from Jakarta and had been approached by one Janah Elizabeth ('Janah') to come to Malaysia to collect certain 'barang perniagaan' for Janah's import/export business. In Kuala Lumpur, A1 and A2 submitted that they were instructed by Janah to collect a big black bag from a foreigner at a McDonald's near Puduraya and to collect a bag from a person in Room 305. They denied that they knew that the bags contained the drugs concealed in the secret compartments. A3, in her defence, stated that she was on transit in Kuala Lumpur and was staying in Winson Hotel. According to A3, she had checked into Room 305 and subsequently an Indonesian woman with whom she got acquainted with at the lobby of the hotel had visited her in the room. A3 submitted that she had then left the hotel for a stroll outside when she was arrested and brought back to the hotel. At the end of the trial, the trial judge was not satisfied that the defence of the accused persons considered separately and together had cast any doubt on the prosecution's case. Thus, the three accused persons were found guilty of the said charge and was sentenced to death by hanging under s. 39B(2) of the DDA. Hence, the appellants appealed. The thrust of the submissions of A1 and A2 was that they were both 'innocent carriers' and could not be held to have had knowledge that the concealed packages in both the bags were drugs. As for A3, it was her submission that (i) there was no nexus proved between A3 and A1/A2 and also between A3 and the two bags, P9 and P10; (ii) the identified 'mixed' DNA profile as detected on the black long pants found in P10 was not in itself safe or sufficient to implicate A3 with 'custody, control or dominion' of the drugs found concealed in P10.

**Held (dismissing appeals of A1 and A2; allowing appeal of A3)**  
**Per Varghese George JCA delivering the judgment of the court:**

- (1) Looking at the evidence in totality, A1 and A2 could not exculpate their involvement in the trafficking of the seized drugs by saying that they were merely 'innocent carriers' in this transaction. They could not be 'innocent' when they had voluntarily agreed to come over to another country from their own to merely collect and return with some 'merchandise' for a third party without enquiring further as to what was

- A the nature of the business of that third party or of the nature or details of the material to be brought back to Indonesia. They should have put an enquiry and ought to have rightfully refused to carry out such an assignment if no satisfactory explanation as to its contents was forthcoming from 'Janah.' There was no such effort made by A1 and A2
- B to bolster the genuineness, if at all, of the so-called defence tendered only when they had been actually apprehended red-handed, so to speak. (para 46)
- (2) The trial judge was not in error when the court ruled that A1 and A2 had not at the earliest available opportunity raised the issue about the very existence or the role of 'Janah' in this episode, to enable adequate opportunity for the prosecution to undertake necessary investigations. Their cautioned statements were silent as to such matter. Therefore, there were no reasons to interfere with the finding of guilt made by the trial judge and the sentence imposed by the trial court against A1 and A2. Thus, the conviction and sentence handed down by the High Court against A1 and A2 was affirmed. (para 47)
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- (3) There were no drugs found in Room 305 that was occupied by A3. Nor was there any other incriminating evidence found in that room or on the person of A3 to implicate her to the charge brought against her. The prosecution case to link A3 to the seized drugs was premised on the testimony that P10 was the bag seen to have been taken out of Room 305 and also based on the discovery of the black pants belonging to A3 in P10. However, there was no evidence that P10 had remained completely intact between the time it left Room 305 and when it was ripped open and the concealed drugs was exposed by the raiding party in Room 409. The possibility that the bag could have been tampered with during that interim period to include the drugs within it could not be ruled out at all. There were also clothes belonging to A1 and/or A2 found in P10 when the raiding party opened that bag in Room 409. (paras 53 & 54)
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- G (4) The prosecution had relied upon the evidence that a pair of long black pants found in P10 bore a mixed DNA profile belonging to two women, one of which was identified as being consistent with the DNA profile of A3. However, since there was another DNA profile belonging to another unidentified female derived from the pants, such evidence could not amount to conclusive evidence that A3 was responsible for concealing the drugs in P10, much less that she had 'possession' of the same, in the physical sense, or that it could be reasonably inferred that she had 'knowledge' as to the concealed contraband drugs found in P10. The defence had cast a reasonable doubt on the prosecution's case. Thus, the conviction of A3 on the charge brought against A3 was definitely not safe in the circumstances. (para 55)
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*Bahasa Malaysia Translation Of Headnotes*

Perayu-perayu, A1, A2 dan A3, telah didakwa secara bersesama atas kesalahan pengedaran 3421.5g methamphetamine di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Keterangan pihak pendakwaan menunjukkan bahawa A1 dan A2 telah bersama-sama pada malam 5 Julai 2009 mendaftar masuk ke Hotel Winsin dan menginap di Bilik 409. A3 pula telah mendaftar masuk ke hotel yang sama pada pagi 7 Julai 2009 dan telah dibenarkan mengguna Bilik 305. Bertindak atas maklumat yang telah diberikan bahawa satu transaksi melibatkan dadah akan berlaku di Hotel Winsin, SP6 dan pihak serbuan telah memerhatikan Bilik 305. Pada pukul 11 pagi, seorang perempuan telah dilihat masuk Bilik 305 dan meninggalkan bilik tersebut dengan sebuah beg kanvas berwarna biru. Menurut saksi-saksi pihak polis, A1 dan A2 seterusnya berjumpa dengan A3 di jalan raya di luar hotel. Ketiga-tiga mereka ditahan dan dibawa balik ke hotel. Satu penggeledahan berlaku di Bilik 305 di mana tiada apa-apa yang menunjukkan seseorang itu bersalah ditemui. Di Bilik 409, satu beg besar berwarna hitam tidak berkunci ('P9') dijumpai dan selepas membuat pemeriksaan ke atas P9, satu bungkusan plastik berwarna perang yang mengandungi beberapa bahan dalam bentuk hablur dan serbuk dijumpai dalam bahagian yang tersembunyi. Satu lagi beg berwarna biru gelap ('P10') yang turut dijumpai di Bilik 409 telah diperiksa di mana dua bungkusan plastik berwarna gelap dijumpai tersembunyi serta mengandungi bahan-bahan yang sama. Bungkusan-bungkusan ini kemudiannya dihantar untuk dianalisa dan laporan Jabatan Kimia menunjukkan bahawa bahan-bahan yang telah dirampas tersebut adalah methamphetamine. Kes pihak pendakwaan secara asasnya adalah bahawa dadah-dadah tersebut dijumpai dalam beg-beg yang ditemui dalam Bilik 409 yang telah diduduki oleh A1 dan A2. Pihak pendakwaan menghujahkan bahawa P10 adalah beg kanvas yang telah dibawa oleh A3 seperti dilihat dalam rakaman CCTV, yang kemudiannya telah dibawa keluar dari Bilik 305 oleh A2 apabila A2 dilihat keluar dari bilik tersebut. Tambahan lagi, menurut pihak pendakwaan, sepasang seluar panjang berwarna hitam yang mempunyai profil DNA A3 ditemui dalam P10. Hakim bicara berpuas hati bahawa pihak pendakwaan telah membuktikan satu kes *prima facie* terhadap ketiga-tiga orang tertuduh dan telah memanggil pembelaan. A1 dan A2 menghujahkan bahawa mereka datang dari Jakarta dan telah didatangi oleh seorang yang bernama Janah Elizabeth ('Janah') untuk ke Malaysia bagi mengambil 'barang-barang perniagaan' untuk perniagaan import/eksport Janah. Di Kuala Lumpur, A1 dan A2 menghujahkan bahawa mereka diarahkan oleh Janah untuk mengambil satu beg hitam yang besar daripada seorang warga asing di McDonalds berdekatan Puduraya dan untuk mengambil sebuah beg daripada seseorang dalam Bilik 305. Mereka menafikan bahawa mereka mengetahui yang beg-beg tersebut mengandungi dadah-dadah yang tersembunyi dalam bahagian-bahagian

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- A rahsia. A3, dalam pembelaannya, menyatakan bahawa dia sedang transit di Kuala Lumpur dan tinggal di Hotel Winson. Menurut A3, dia telah memasuki Bilik 305 dan selepas itu seorang wanita warga Indonesia yang telah dikenalnya di lobi hotel tersebut telah melawat di biliknya. A3 menghujahkan bahawa dia kemudiannya meninggalkan hotel tersebut untuk berjalan-jalan di luar di mana dia telah ditahan dan dibawa balik ke hotel.
- B Di akhir kes perbicaraan, hakim bicara tidak berpuas hati bahawa pembelaan pihak tertuduh telah membangkitkan keraguan atas kes pendakwaan apabila dipertimbangkan secara berasingan dan bersama. Oleh itu, ketiga-tiga tertuduh didapati bersalah atas kesalahan tersebut dan dijatuhkan hukuman gantung sampai mati di bawah s. 39B(2) ADB. Oleh itu, perayu-perayu merayu. Asas penghujahan A1 dan A2 adalah bahawa mereka berdua merupakan pembawa-pembawa tidak bersalah dan tidak boleh dikatakan mempunyai pengetahuan bahawa bungkusan-bungkusan yang tersembunyi dalam kedua-dua beg tersebut adalah dadah. Bagi A3 pula, hujahannya adalah bahawa (i) tiada perkaitan dibuktikan antara A3 dengan A1/A2 dan juga antara A3 dengan kedua-dua beg P9 dan P10; (ii) DNA campuran yang dikenalpasti pada seluar panjang berwarna hitam yang dijumpai dalam P10 tidak dengan sendirinya selamat atau cukup untuk mensabitkan A3 dengan 'jagaan, kawalan atau pemegangan' dadah-dadah yang dijumpai tersembunyi dalam P10.

E **Diputuskan (menolak rayuan A1 dan A2; membenarkan rayuan A3)**  
**Oleh Varghese George HMR menyampaikan penghakiman mahkamah:**

- (1) Melihat keterangan secara menyeluruh, A1 dan A2 tidak dapat membebaskan diri mereka daripada penglibatan pengedaran dadah yang dirampas tersebut dengan menyatakan bahawa mereka hanya 'pembawa tidak bersalah' dalam transaksi ini. Mereka tidak boleh dianggap 'tidak bersalah' apabila mereka telah secara sukarela bersetuju untuk ke negara lain hanya untuk mengambil dan membawa pulang 'barang niaga' untuk pihak ketiga tanpa menyoal apakah jenis perniagaan pihak ketiga atau sifat serta butiran bahan untuk dibawa pulang ke Indonesia. Mereka sepatutnya membuat siasatan dan berhak menolak daripada menjalankan apa-apa tugas jika tiada penjelasan yang memuaskan mengenai kandungannya yang datang daripada Janah. Tiada usaha dibuat oleh A1 dan A2 untuk meningkatkan ketulenan, jika ada, berkenaan pembelaan yang telah dikemukakan hanya apabila mereka telah diberkas dalam keadaan bersalah.
- (2) Hakim bicara tidak terkhilaf dalam memutuskan bahawa A1 dan A2 tidak mengambil peluang yang paling awal untuk membangkitkan isu berkenaan kewujudan dan peranan yang dimainkan oleh 'Janah' dalam kejadian ini, untuk membolehkan peluang yang mencukupi bagi pihak pendakwaan menjalankan penyiasatan yang perlu. Pernyataan amaran mereka tidak menyatakan apa-apa berkenaan perkara ini. Oleh itu, tiada

- alasan untuk campur tangan dalam dapatan bersalah yang diputuskan oleh hakim bicara dan hukuman yang dijatuhkan oleh mahkamah bicara terhadap A1 dan A2. Sabitan dan hukuman yang diberikan oleh Mahkamah Tinggi terhadap A1 dan A2 disahkan. A
- (3) Tiada dadah ditemui dalam Bilik 305 yang diduduki oleh A3. Tidak terdapat juga bukti yang menunjukkan kebersalahan yang ditemui dalam bilik itu serta atas A3 untuk mengaitkannya dengan pertuduhan terhadapnya. Kes pendakwaan untuk menghubungkan A3 kepada dadah-dadah yang dirampas adalah berdasarkan keterangan bahawa P10 adalah beg yang dilihat dibawa keluar dari Bilik 305 dan juga berdasarkan penemuan seluar hitam kepunyaan A3 dalam P10. Walau bagaimanapun, tiada keterangan bahawa P10 kekal lengkap antara masa ia meninggalkan Bilik 305 dan apabila ia dikoyakkan dan dadah-dadah yang disembunyikan didedahkan oleh pihak serbuan dalam Bilik 409. Kemungkinan bahawa beg tersebut mungkin telah diusik dalam tempoh interim untuk dadah dimasukkan tidak boleh diketepikan sama sekali. Terdapat juga pakaian kepunyaan A1 dan/atau A2 yang dijumpai dalam P10 apabila pihak serbuan membuka beg tersebut dalam Bilik 409. B C D
- (4) Pihak pendakwaan bergantung kepada keterangan bahawa sepasang seluar panjang berwarna hitam yang dijumpai dalam P10 menghasilkan profil DNA bercampur kepunyaan dua wanita, yang satu daripadanya dikenal pasti sebagai konsisten dengan profil DNA A3. Walau bagaimanapun, oleh kerana terdapat juga profil DNA kepunyaan seorang wanita yang tidak dikenal pasti pada seluar tersebut, keterangan itu tidak boleh terjumlah kepada keterangan muktamad bahawa A3 bertanggungjawab menyembunyikan dadah-dadah dalam P10, juga bahawa dia mempunyai 'milikan' yang sama, dalam erti kata fizikal, atau ia boleh secara munasabah disimpulkan bahawa dia mempunyai 'pengetahuan' berkenaan dadah-dadah yang disembunyikan yang dijumpai dalam P10. Pihak pembelaan telah menimbulkan keraguan munasabah ke atas kes pihak pendakwaan. Oleh itu, sabitan A3 atas pertuduhan yang dipertuduhkan terhadap A3 tidak selamat dalam keadaan ini. E F G

**Case(s) referred to:**

*Balachandran v. PP* [2005] 1 CLJ 85 FC (*refd*)

*Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC (*refd*)

*Parlan Dadeh v. PP* [2009] 1 CLJ 717 FC (*refd*)

*PP v. Denish Madhavan* [2010] 5 CLJ 635 FC (*refd*)

*PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 FC (*refd*)

*PP v. Ouseng Sama-Ae* [2008] 1 CLJ 337 CA (*refd*)

*Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17 FC (*refd*)

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**A Legislation referred to:**

Criminal Procedure Code, s. 180

Dangerous Drugs Act 1952, ss. 2, 37(da)(xvi), 39B(2)

Penal Code, s. 34

*For the 1st & 2nd appellants - Nurrul Nadia Norrizan; M/s Gooi & Azura*

**B** *For the 3rd appellant - Suzanawati Ismail; M/s Suzana Ismail & Partners*

*For the respondent - Tengku Intan Suraya Tengku Ismail; DPP*

*[Appeal from High Court, Kuala Lumpur; Criminal Case No: 45-68-2009]*

*Reported by Suhainah Wahiduddin*

**C****JUDGMENT**

**Varghese George JCA:**

**Introduction**

**D** [1] There were three appeals before us. The respective appellants were:

(a) Windi Lestari (Indonesian) – accused/appellant 1 (A1)

(b) Jesyca Caroline (Indonesian) – accused/appellant 2 (A2)

(c) Miss Supharak Chomphupraheth (Thai) – accused/appellant 3 (A3)

**E**

[2] A1, A2 and A3, all women, had been jointly charged at the Kuala Lumpur High Court. The charge proffered against them was as follows:

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Bahawa kamu bersama-sama pada 7 Julai 2009, jam lebih kurang 11.40 pagi, di bilik bernombor 409, Winsin Hotel Chinatown Sdn Bhd, No. 1 & 3 Jalan Petaling, 50000 Kuala Lumpur, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur telah mengedar dadah berbahaya iaitu 3421.5 gram Methamphetamine dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

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[3] The learned trial judge had on 18 July 2012 found all the accused guilty of the said charge and had imposed on them the mandatory sentence of death by hanging under s. 39B(2) of the Dangerous Drugs Act 1952 (DDA).

**H**

[4] In these appeals before us, having heard and considered the submissions of respective counsel for the accused and the learned Timbalan Pendakwa Raya for the Public Prosecutor, we had on 17 March 2014 unanimously:

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(a) dismissed the appeals of A1 and A2, and affirmed the conviction and sentenced handed down by the High Court against them; and

(b) allowed the appeal of A3 and set aside the conviction and sentence imposed against her; accordingly we had acquitted and discharged her of the charge brought against her.

[5] The learned trial judge had in the grounds of judgment (167 pages) elaborately dealt with the facts of the case and had highlighted the relevant as well as significant evidence adduced by the prosecution (through some 15 witnesses) against all the three accused. The learned trial judge had held that a *prima facie* case had been made out at the close of the prosecution's case and proceeded to order the accused to enter their defence.

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[6] The options open to the accused were explained to the accused by the court and all the accused elected to make their defence by issuing respective statements from the dock. At the close of the defence's case, the learned trial judge ruled that no reasonable doubt had been raised by any one of the accused in defence to the case adduced by the prosecution.

C

#### Prosecution's Case

[7] The evidence led by the prosecution showed that A1 and A2 had together on the night of 5 July 2009 checked into Winsin Hotel at Jalan Petaling Kuala Lumpur and occupied Room 409. A1 and A2 continued to occupy that room till 7 July 2009. A3 on the other hand checked into the same hotel on the morning of 7 July 2009 at about 8am and had been allotted the use of Room 305.

D

[8] Acting on information that a transaction involving drugs was to take place at Winsin Hotel involving a Thai woman, SP6 had led a police raiding party on 7 July 2009 and had arrived at the hotel at about 8.30am. He was informed that the Thai woman was in Room 305. He then booked the adjoining rooms 304 and 308 and detailed SP10 to observe Room 305 while seated in the corridor.

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[9] At about 11am SP10 notified SP6 that a woman had entered Room 305. Subsequently this woman left Room 305 with a blue-coloured haversack-bag. SP10 was unable to follow that lady. SP6, SP10 and SP8 then proceeded to the lobby of the hotel to observe movements of this lady through the CCTV.

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[10] A3 then left the hotel and SP6 instructed his men to follow her. Subsequently A1 and A2 came down the lift and went out of the hotel too. SP8 and SP10 observed their movement.

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[11] According to the police witnesses, A1 and A2 met up with A3 on the road outside the hotel. SP6 instructed his officers to arrest all three women. All three women were brought back to the hotel after their arrests; the keys to Room 409 were found on the person of A2 while the keys to the Room 305 were found on A3.

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[12] A1, A2, A3 were taken together to both the rooms. The first search was made at Room 305. Nothing was found in that room except some personal clothing spread out on the bed.

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- A [13] A1, A2, A3 and the police party then moved to Room 409. At this room, SP6 found an unlocked big black suit case (VitrSen) (P9) on the right side of the door. On inspection of this bag it was discovered that it had a concealed compartment and upon prising open the same, a brownish plastic packet containing some substance in crystalline form and also in powder form was discovered (marked RIA).
- B [14] Another bag blue-black in colour (Jack Wolfskin) (P10), also unlocked, was found in this room too and upon close examination, two dark coloured plastic-wrapped packages were found concealed also containing crystalline and powdery substance in it.
- C [15] Clothing and documents were also seized by SP6 from this room. Some of the personal clothing were found stuffed in the two bags.
- D [16] All the three packages were sent for analysis and the report from the Chemistry Department was that the substance seized was methamphetamine with a net weight (after analysis) of 3421.5g (as against a gross weight of 4462.6g excluding the plastic cover).
- E [17] A1, A2 and A3 also consented to their blood being taken for DNA analysis. The clothing recovered had been previously matched by being individually worn and identified by A1, A2 and A3 separately (PT3A, PT3B and PT3C).
- F [18] The report from the scientific officer at the Chemistry Department was that there was only one partial match of DNA, namely a pair of black long pants (PT3-(iii)a – from PT3-C) which disclosed a mixed DNA profile of two females – one of which was consistent or probable with the source represented by blood sample ‘C’ (labelled ‘Miss Supharak Chomphurahet’), the accused A3.
- This black long pants had been recovered by SP6 from the bag P10 found in Room 409.
- G [19] The prosecution’s case essentially was that the drugs were recovered from the bags found in Room 409 occupied by A1 and A2. The hotel CCTV recordings adduced in evidence clearly showed that the big black suit case – P9 was seen to be one brought in by A1 and A2 when they checked in; furthermore their clothing were also recovered in that bag.
- H The prosecution’s contention was that P10 was the bag (haversack) seen in similar CCTV recording brought in by A3 on 7 July 2009 and subsequently seen by SP10 to have been taken out by A2 from Room 305 when A2 was seen exiting from that room earlier in the morning of 7 July 2009. Also, the black long pants with the DNA Profile of A3 (partial/mixed) was found in
- I P10 (the same haversack).

**Close Of Prosecution's Case**

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[20] At the close of the prosecution's case based essentially on the salient facts summarised above, the learned trial judge stated in her grounds of judgment that the court had subjected the evidence before it in its totality to maximum evaluation (*Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301; *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393; s. 180 of the Criminal Procedure Code). The learned trial judge was satisfied that the prosecution had established a *prima facie* case against all three accused. The court held that:

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... there was no break in the chain of evidence in respect of the 2 bags, the 3 plastic packages containing the methamphetamine, the 3 blood specimens of the 3 accused persons and the one pair of black long pants which had the mixed DNA profile of the 3rd accused [A3] and unknown woman.

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[21] Her Ladyship went on to state:

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The court was satisfied that the 3 accused persons had, jointly and pursuant to their common intention as provided in s. 34 of the Penal Code, trafficked in the 3,421.5 grammes of methamphetamine, which was found concealed in three plastic packages in the three secret compartments in the 2 bags, ie the two secret compartments in the blue and black coloured "Jack Wolfskin" haversack marked "RIB" (P9) by the complainant (PW6) and one secret compartment in the black "VitrSen" luggage bag marked "RIA" (P10) by the complainant (PW6).

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This is because there was evidence to show that they had joint custody and control of and dominion over the 2 bags and that they also had knowledge that the methamphetamine was concealed in the 3 secret compartments in the 2 bags at the material time.

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[22] As regard 'common intention' the learned trial judge noted that although under s. 34 of the Penal Code the relevant pre-planning or pre-concert may develop on the spot or during the course of the commission of the offence, the crucial test was that such plan must precede the act constituting the offence. The existence of common intention was a question of fact which could be inferred from the circumstances of each particular case. (*Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17).

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[23] As the quantity of the methamphetamine seized has crossed the threshold to trigger the presumption of 'trafficking' in s. 37(da)(xvi) of the DDA, the learned trial judge held that the A1, A2 and A3 were deemed to be 'trafficking' unless the contrary was proved by the three accused persons.

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[24] The learned trial judge cautioned herself that without the requisite *mens rea* possession or *animus possidendi* of the drugs, the presumption of trafficking would not arise. (*Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170; [1998] 2 MLJ 273).

I

- A The learned trial judge held that there were two elements required to be proven to satisfy *mens rea* possession. The first element was the physical element, namely that the accused were in custody and control of the dangerous drugs and had the power of disposal over the same (*PP v. Ouseng Sama-Ae* [2008] 1 CLJ 337). This had been satisfied as the drugs were found
- B in the two bags in room 409 (occupied by A1 and A2), the larger one of which (P9) as evidenced by the CCTV recording (and the still photographs derived from the recording) was the same bag brought into the hotel by A1 and A2 when they checked in. As regards the other bag, the haversack (P10), the learned trial judge's conclusion was that on the evidence of SP10 and the
- C CCTV recordings, it was the same bag that A3 had brought with her when she checked in on 7 July 2009 and which was subsequently taken by the lady identified as A2 from Room 305 that same morning. A1, A2 and A3 therefore had the custody and control over the bags in which the drugs were found; their clothes were also found in the bags.
- D [25] The learned trial judge was also of the view the acts or conduct of A1, A2 and A3 fell well within the meaning of the words 'keeping', 'giving', 'transporting' and 'carrying' in the definition of 'trafficking' in s. 2 of the DDA.
- E It was also observed by the court that there was no need to prove that any of the accused had exclusive possession of the room or for that matter the bags (*PP v. Denish Madhavan* [2010] 5 CLJ 635).
- F [26] The second element that had to be proven by the prosecution was the mental element, that the accused had knowledge that the concealed substance was drugs. Since it was almost impossible to prove the mental element of knowledge, the law, it was observed by the court, permitted an inference to be drawn from the circumstances surrounding the discovery of the substance (*Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19).
- G [27] In this respect, the learned trial judge held that the fact that the drugs were concealed in secret compartments and the evidence of the arresting officers, especially of PW10, that by demeanour the accused appeared anxious and scared when confronted and arrested, was sufficient basis for the court to draw an irresistible inference that A1, A2 and A3 all knew the nature of the contents of the three plastic packages found concealed in the two bags.
- H [28] The learned trial judge's conclusion was recorded as follows:
- I In applying the established legal principles of possession and *mens rea* possession to the facts and circumstance of the instant case, the court was satisfied that the 3 accused persons had joint *mens rea* possession of the 2 bags containing the methamphetamine and that they were intending to part with the possession of the methamphetamine to a 3rd party pursuant to their common intention had they not been prevented from doing so upon being arrested by the complainant's (PW6's) raiding party.

[29] As regards how A3 was implicated in the alleged crime, the learned trial judge observed specifically as follows: A

... it is apparent that the situation of the 3rd accused to the haversack (P10) showed that she had power to deal with the haversack and its contents, ie her clothes and the concealed drugs, as owner to the exclusion of all other persons in case of need. She had put her clothes into the haversack (P10) before she checked into the hotel with the haversack (P10). Before she handed over the haversack (P10) containing the concealed drugs to the 2nd accused she took out some of her clothes from the haversack (P10) leaving the rest of her clothes in the haversack (P10) one of which, ie the black pair of long pants, had a part of her DNA profile on it. B C

And further down in the grounds:

Finally, there was a doubt raised in the prosecution case as to the connection or nexus between the 3rd accused and the drugs found concealed in the haversack (P10) because the bag which the 3rd accused was seen pulling with her right hand upon entering the hotel was a luggage bag which was greyish in colour unlike the blue and black coloured haversack (P10), which was taken out of the 3rd accused's room by the 2nd accused. D

Having viewed the CCTV recording, the relevant still photograph (P105 (11)), the court found that the images in both of them of the one bag which the 3rd accused can be seen pulling with her right hand upon entering the hotel have the same predominant blue colour with some black colour. Furthermore, the court could see that in the CCTV recording the bag appeared to be wrapped with a layer or layers of a transparent plastic thereby giving it a glossy or shining or whitish look or appearance when it was captured by the CCTV camera under the reflective glare of the natural light. ... E F

And also:

The court was, therefore, convinced that the haversack (P10) was the same bag which the 3rd accused had brought with her to the Winsin Hotel on the day in question and that it was also the same bag which the 2nd accused was seen (in the CCTV recording and in the 2 still photographs (P104 (14) and (15)) carrying on her back when she came out of the 3rd accused's room on 7 July 2009. G

#### Defence

[30] As noted earlier, A1, A2 and A3 elected to make statements from the dock in defence. The written statements read out by A1 and A2 were almost identical. H

They said they were from Jakarta and had been separately approached by one Janah Elizabeth (Janah), to come to Malaysia to collect certain '*barang perniagaan*' for Janah's import/export business. Janah told them that all expenses will be borne by Janah's company and each of them will be paid I

A 8 million rupiah upon completion of the job. A1 and A2 only met each other and was introduced by Janah at the Airport. They were given some cash each and were to travel to Kuala Lumpur through Batam and Johore. At Kuala Lumpur, as instructed by Janah, they were to collect a big black bag from a foreigner at a McDonalds Restaurant near Puduraya. They then checked in at Hotel Winsin at Petaling Street. Janah then told them to wait a few days as some further merchandise was to be collected before they returned to Jakarta.

C [31] A1 and A2 went on to state that Janah subsequently called them to collect a bag from a person in Room 305 which A2 did. They had placed their clothing in both the big bag and the bag collected from Room 305. They had then gone out of the hotel for a meal when they were arrested and brought back to the hotel. Upon search of the bags in Room 409, the packages wrapped in plastic were discovered.

D They denied that they knew that the bags contained the drugs concealed in the secret compartments. They also denied that they were aware that it was drugs that they were to collect for Janah and if they had known that they would not have accepted the temporary job from Janah at all.

E [32] They (A1 and A2) said they had made statements to the police after their arrests where they had explained in detail what had happened and that all was done at Janah's instructions, whom they had trusted.

Counsel for A1 and A2 argued that the accused were in the circumstances 'innocent carriers' who had been cheated.

F [33] A3 in her dock statement stated that she was on transit in Kuala Lumpur on a return flight from Johannesburg to Bangkok and her boyfriend had arranged for her to stay in Winsin Hotel. She had checked into Room 305 on 7 July 2009 and subsequently an Indonesian woman with whom she got acquainted recently (at the lobby of the hotel) had visited her in the room.

G She had then left the hotel for a stroll outside when she was arrested and brought back to the hotel. The police had searched her Room 305 but no contraband was discovered there. She was then taken to another room upstairs where upon a search of two bags there, the alleged drugs were discovered.

#### H At The End Of Trial

I [34] The learned trial judge at the close of the defence's case was not satisfied that the defence from the dock of the accused considered 'separately and together' had cast any doubt in the prosecution's case. Her Ladyship did not believe that A1 was telling the truth as the bag received from the person at McDonalds was a heavy one and reasonably A1 would have been expected to examine or inspect the contents of the bag. A1 had even put her own clothes into the bag and clearly this was intended to pass off the luggage as belonging to her.

[35] Both A1 and A2, the learned trial judge noted, had failed to put their defence at the first available opportunity to the prosecution's witnesses, namely, their version that they had received a phone call from 'Janah' while they were checking in at the hotel and even subsequently; for this reason the investigation officer did not find it necessary to carry out any forensic check on their hand-phones seized by the police. It was also noted by the trial judge that PW6, PW8 and PW10 were not cross-examined on this either when they gave evidence, namely, in respect of A1 and A2's version of Janah's role and involvement in the crime.

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[36] Further, the claim of A1 and A2 that they had given information as to the existence and role of and that they had acted on instructions from 'Janah' was only raised towards the end of the prosecution's case when PW11 (the IO) was on the stand.

C

[37] Also A2 had herself confirmed that she had collected a black bag from the person at Room 305 on 7 July 2009. The learned trial judge was of the view that A2 should have been put on suspicion because the bag was heavy and when she opened it to put her clothes in, she would have discovered that there obviously were no 'trade goods/merchandise' in that bag.

D

[38] As for A3, the learned trial judge was of the view that although A3 attempted to distance herself from A1 and A2, the evidence especially showed that the bag P10 was brought into the hotel by A3 and that was the same bag that A2 had subsequently confirmed to have taken out from Room 305. The court held that in the circumstances the denial of A3 that she had custody, control or care or dominion of either or both the bags, was a bare denial and did not cast any doubt on the prosecution's case.

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### The Appeal And Our Conclusion

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#### *A1 And A2*

[39] The thrust of the submissions of counsel for A1 and A2 before us was that the two accused were 'innocent carriers' and could not be held to have had 'knowledge' that the concealed packages in both the bags were drugs. The learned trial judge therefore, it was contended, had not given sufficient consideration to A1 and A2's defence at the close of the case to impose culpability on them for the crime charged.

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[40] It was urged upon us that A1 and A2 did not attempt to flee nor did they put up any resistance when apprehended. Further both the bags at Room 409 had been left unguarded and unlocked. Such conduct was inconsistent with any inferred or imputed 'knowledge' on the part of A1 and A2 that there were drugs concealed or hidden in the bags, much less of any intention to 'traffic' such contraband.

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Further P9 had been collected by A1, A2 from another person at the McDonalds Restaurant, while P10 was taken from Room 305.

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A [41] It was submitted that the fact that A1 and A2 appeared to be ‘cemas dan takut’ when arrested as per SP10’s evidence and the further fact that their clothes were found in the two bags were not sufficient for the learned judge to draw an inference that A1 and A2 had knowledge that there was illicit substance concealed in the bags in the secret compartments, as it were, or  
B such substance were drugs since the bags had to be ripped open to disclose this. By all accounts therefore, A1 and A2 had raised a reasonable doubt that they were innocent carriers.

[42] It was also urged upon us that there was a ‘gap’ in the prosecution’s case in that the prosecution had failed to send the hand-phones seized from  
C A1/A2 for forensic tests to confirm whether there was indeed the phone calls from Janah as claimed by the accused; such investigation would have shown that A1 and A2 were indeed innocent carriers. It would also have shown there were no phone-calls between A3 and A1/A2 indicate any ‘pre-planning’ or common intention between them.

D [43] It was contended before us that although it was true that only when SP11 was questioned on the stand, did counsel for A1 and A2 raise the issue that in their respective cautioned statements, the accused had already mentioned the involvement of ‘Janah’ and this part of their statement had not been recorded by the recording officers, the prosecution still had the  
E opportunity to call the recording officers to confirm or deny the same and/or to undertake further investigation, that is before the prosecution closed their case; this was not done.

It was also submitted that in so far as there was a failure to undertake investigations on (a) the ‘hand-phone’ recordings, and (b) on ‘Janah’  
F mentioned to the officers who took down the cautioned statements of A1 and A2, defence of A1 and A2 (*albeit* unsworn and from the dock) had raised a ‘reasonable doubt’ and the trial judge ought to have drawn an adverse inference against the prosecution based on that defence.

G [44] In our assessment, in so far as the appeal by A1 and A2 was concerned, we could not agree with counsel that learned trial judge had erred when Her Ladyship at the close of the prosecution’s case had called for their defence and in any event had not given due consideration to the defence, though only made by way of statements from the dock entered by the said accused. We must observe here that the learned trial judge had meticulously analysed the  
H evidence and had set out in the grounds of judgment, why the court was not satisfied that a reasonable doubt had been raised at all on the prosecution’s case made out against A1 and A2.

I [45] Looking at the evidence in totality, A1 and A2 could not exculpate their involvement in the trafficking of the seized drugs by saying that they were merely ‘innocent carriers’ in this transaction. In our view, how could they be ‘innocent’, when they voluntarily agreed to come over to another country from their own to merely collect and return with some

‘merchandise’ for a recently met third party without enquiring further as to what was the nature of the business of that third party or of the nature or details of the material to be brought back to Indonesia.

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[46] A1 and A2 had without undertaking any such enquiry, which they would have been reasonably expected to make in any event, had agreed to collect two ‘bags’, not merely some ‘parcel’, to be brought back to Indonesia. Their trip here itself was nebulous and only lasting for just a few days; they had also only brought with them very little personal clothing. There was no other ostensibly legitimate purpose for coming here. As noted by the learned trial judge, the bags turned out to be heavy ones and they should have been put an enquiry even at that stage and ought to have rightfully refused to carry out such an assignment if no satisfactory explanation as to its contents was forthcoming from ‘Janah’ who they were in contact with. There was no such effort made by A1 and A2 to bolster the genuineness, if at all, of the so-called defence tendered only when they had been actually apprehended red handed, so to speak.

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[47] We also must state that the learned trial judge was not in error when the court ruled that A1 and A2 had not at the earliest available opportunity raised the issue about the very existence or the role of ‘Janah’ in this episode, to enable adequate opportunity for the prosecution to undertake necessary investigations. Their cautioned statement were silent as to such a matter. This alleged or claimed omission by the recording officers was only raised at the closing stages of the prosecution’s case in any event, namely, without any of the prosecution witnesses prior to SP11 being cross-examined on such alleged material information said to have been given by A1 or A2 during investigations.

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[48] We therefore did not find any reasons to interfere with the finding of guilt made by the learned trial judge and the sentence imposed by the trial court against A1 and A2.

A3

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[49] The thrust of the appeal of A3 was however different and the grounds adduced before us were:

- (a) that there was no nexus proven between A3 and A1/A2 and also between A3 and the two bags, P9 and P10;
- (b) the identified ‘mixed’ DNA profile as detected on the black long pants found in Bag P10 (one of which matched that of A3) was not in itself safe or sufficient to implicate A3 with ‘custody, control or dominion’ of the drugs found concealed in P10.

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[50] It was counsel for A3’s argument that apart from the evidence of a prosecution witness that A3 had been seen to talk to A1 and A2 outside the hotel, there was no other independent or credible evidence (by way of CCTV recordings perhaps) to show any contact or discussion between A3 on the one

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A part, and A1 or A2 on the other part. Common intention or collaboration as between all accused charged was an essential ingredient and the mere evidence of one witness claiming that he had seen them talking with each other in the street was not also sufficient to implicate A3 to the charge.

B [51] More critically, it was urged upon us that even if the bag taken out of Room 305 by A2 was P10 itself, there was no direct evidence that the concealed drugs found in P10 (subsequently when it was opened by the raiding party in Room 409) was as a matter of fact in P10 itself when the bag left Room 305. The possibility of the bag being tampered with in the interim or the drugs being planted therein after it had left Room 305 could not be ruled out; there was therefore a serious gap in the prosecution's case, the benefit of which should go to A3, it was argued.

D [52] It was also highlighted by counsel for A3 that the evidence showed that the police during investigations and identification of the clothing found in the bags had also made A3 to wear the long black pants for purposes of 'fitting' or identifying that clothing to be hers. It was suggested that in such circumstances, it was natural that the pants would contain some material or sample from which A3's DNA profile could be developed or deduced from. Since, the mixed DNA profile derived indicated another female source as well, it was definitely not safe to use this sole 'link' to implicate A3 with the contents of P10.

E [53] In our assessment, a material fact to be noted was that there was no drugs found in Room 305, that is, the room which had been occupied by A3. Nor was there any other incriminating evidence found in that room or on the person of A3 to implicate her to the charge brought against her. The prosecution's case to link A3 to the seized drugs was premised on the testimony that P10 was the bag seen to have been taken out of Room 305 and also based on the discovery of the black pants belonging to A3 in P10.

F [54] We found merit in the contention of counsel for A3 that there was no evidence that the bag P10 had remained completely intact between the time it left Room 305 and when it was ripped open and the concealed drugs exposed by the raiding party in Room 409 and the possibility that the bag could have been tampered with during that interim period to include the drugs within it could not be ruled out at all. There were also clothing belonging to A1 and/or A2 found in P10 when the raiding party opened that bag in Room 409.

G [55] The remaining piece of evidence relied upon by the prosecution was the long black pants found in P10 bearing a mixed DNA profile belonging to two women, one of which profile was identified as being consistent or matching with the DNA profile of A3. In our view, since there was another DNA profile belonging to another unidentified female derived from the pants, such evidence could not amount to conclusive evidence that A3 was

responsible for concealing the drugs in P10, much less that she had 'possession' of the same, in the physical sense, or that it could be reasonably inferred that she had 'knowledge' as to the concealed contraband drugs found in P10.

**[56]** In our view based on the matters discussed and elaborated above in paras. 53, 54 and 55 of these grounds, the defence had cast a reasonable doubt on the prosecution's case presented against A3. The conviction of A3 on the charge brought against A3 was therefore definitely not safe in the circumstances.

Accordingly, we were constrained to set aside the conviction and sentence imposed on A3. We allowed A3's appeal and ordered that she be acquitted and discharged of the charge brought against her.

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